

No. 12426.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

HARRY D. LECKAS,

Appellant,

vs.

CATALINA ISLAND STEAMSHIP LINE,

Appellee.

APPELLANT'S OPENING BRIEF.

FILED

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OPENING BRIEF.

This is an appeal in Admiralty from the portion of a final decree in favor of respondents in the United States District Court for the Southern District of California, Central Division, in an action for wages and maintenance. Appellant sustained injuries on a sidewalk in front of respondents' dock on the 8th day of November, 1946, to the 22nd day of January, 1947, as the result of the injuries sustained and remained an out-patient and was disabled by reason of said injuries from said 22nd day of January, 1947, to and including the 13th day of April, 1947.

The pleadings in the District Court were:

(a) Libel *in Personam* for Wages, Maintenance and Cure [Ap. 5]; Answer of Catalina Island Steamship Line, a corporation [Ap. 10].

A trial was had before United States District Court with the Hon. Wm. C. Mathes, Judge Presiding. After hearing the evidence, oral testimony and written documents, proctors for libelant and respondent argued the case. The Honorable Judge then found in favor of the libelant upon the issue of maintenance and in favor of the respondents upon the issue of wages during the period of libelant's disability.

On the 26th day of July, 1949, the Honorable Judge then made his Order allowing libelant his maintenance but failed to make any finding on the question of wages [Ap. 40], thereafter on the 3rd day of October, 1949, a further argument was had before the Hon. United States District Judge by proctors for libelant and respondent and at said time further evidence was taken and further stipulations were entered into by and between the parties to said action and thereupon the matter was submitted and the Hon. United States District Judge made his Findings of Fact and Conclusions of Law and signed the same on said 3rd day of October, 1949 [Ap. 42].

A Final Decree was signed on the 3rd day of October, 1949 [Ap. 46].

The Apostles on appeal certified by the Clerk of the District Court, in addition to the pleadings and orders

hereinabove set forth, include the following: Assignment of Errors [Ap. 48]; Petition for Appeal without furnishing bonds or prepayment of or Order Allowing Appeal without furnishing Bond or Costs [Ap. 51]; making deposit to secure fees or costs [Ap. 50]; Notice of Appeal and Affidavit of Mailing thereof [Ap. 52]; Praecipe [Ap. 54]; Assignment of Errors [Ap. 55]; Petition for Cross-Appeal [Ap. 57]; Order allowing Cross-Appeal [Ap. 58]; Notice of Cross-Appeal and Affidavit of Mailing thereof [Ap. 59]; and Notice of Filing Bond on Appeal [Ap. 61].

The jurisdiction of the District Court over actions, civil and maritime, involving claims for maintenance and cure and damages, arises from Article III, Sections 1 and 2 of the United States Constitution, which provides that the judicial power of the United States shall be vested in the Supreme Court and such inferior courts as Congress may establish, and that such power shall extend to all civil cause of Admiralty and Maritime jurisdiction.

Jurisdiction of civil causes of Admiralty and Maritime jurisdiction was vested in the District Courts of the United States by an Act of Congress on June 25, 1948, U. S. C. A., Section 1333.

Appeals from final decrees in Admiralty are authorized by Section 128-a of the Judicial Code, as amended May 9, 1942 (56 Stat. L. 272, 28 U. S. C. A., Section 225) providing that the Court of Appeals shall have appellate jurisdiction to review by appeal, final decisions.

Statement of the Case.

On the 2nd day of July, 1946, libelant was employed as an oiler on board the U. S. "CATALINA" at Wilmington, California, for a coast-wise voyage and received certificate of discharge from said voyage on the 9th day of November, 1946, immediately after he sustained an injury that prevented him from continuing on such voyage [Ap. 35] [R. Tr. 4, 5 and 6] [Libelant's #3, Ap. 35].

The S. S. "CATALINA" made daily runs from Wilmington to Avalon, Catalina Island, and return. During the summer months the libelant would report for duty on his vessel at 6:00 A. M. every other day. On alternate days he would report at 8:00 A. M. [R. Tr. 26]. After Labor Day, he would report for duty on the vessel at 8:00 A.M. [R. Tr. 26 and 30]. The vessel returned to Wilmington at approximately 6:00 P. M. [R. Tr. 24]. The libelant had one day off each week [R. Tr. 21], and was paid his wages twice a month, on the 5th and 20th day of each month [R. Tr. 22].

On the day of the accident, libelant had just completed assisting shutting down the plant of the S. S. "CATALINA" and left her a little after 6:00 o'clock P. M. [R. Tr. 30]. He walked across the dock at which the vessel was moored and unto a sidewalk adjacent thereto, when he was struck by a hit-and-run automobile that ran upon the sidewalk inflicting his injuries. At the time libelant was on his way home for the night [R. Tr. 27]. [Libelant's #2, Ap. 34.]

Libelant was confined to a hospital from the 8th day of November, 1946, to and including January 22, 1947, for the treatment of the injuries sustained by him on November 8th, 1946 [R. Tr. 5].

Libelant returned to his work in the employ of respondents on April 14, 1947 [R. Tr. 5 and 6].

Libelant was a member of a Union which had a contract with respondent covering wages, hours and other conditions of employment. [Libelant's Exhibit #1, Ap. 17; R. Tr. 9, 10 and 11].

Edward Leroy Mussetter, the master of the S. S. "CATALINA" testified that orders to replace crew members were placed through a Hiring Hall and it was specified whether the man desired was to be for relief or a steady man [R. Tr. 39].

From the evidence the District Court found that the libelant was employed on the S. S. "CATALINA" as a permanent employee [Ap. 43], and the Court found that libelant was in the service of his vessel when he received the injuries complained of on November 8, 1946 [Ap. 44]. The Court further found that the libelant was hospitalized from November 8, 1946, to and including January 22, 1947, and was an outpatient from the 22nd day of January, 1947, to and including the 13th day of April, 1947, and on the 14th day of April, 1947, was able to return to his former employment with the respondent [Ap. 44].

The Court found and concluded that libelant was entitled to maintenance for the period of 81 days at the rate of \$4.50 per day and that respondent was entitled to a credit in the sum of \$200.00 which was paid to libelant for a lease [Ap. 44; R. Tr. 76]. The Court concluded and found that libelant was not entitled to recover wages for any period during which he was disabled by reason of the injury sustained in the service of his vessel [Ap. 44].

Assignment of Errors.

The assignment of errors upon which the appellant relies are set forth in the appendix to this brief, and are summarized in the following statement of points involved in this appeal.

a. The District Court erred in denying appellant full wages during the entire period he was disabled by reason of the injuries sustained by him while in the service of the ship operated by respondent, Catalina Island Steamship Line, a corporation.

b. The District Court erred in not finding that appellant was entitled to recover wages in the sum of \$3,799.88 for the period of November 9, 1946, to and including the 13th day of April, 1947.

Outline of Argument.

I. This appeal is a trial *de novo*.

II. Appellant is entitled to recover his wages from the 9th day of November, 1946, to and including the 13th day of April, 1947.

ARGUMENT.

I.

This Appeal is a Trial De Novo. No Authority Is Necessary to Establish This Point on the Ninth Circuit.

II.

Appellant Is Entitled to Recover Full Wages During the Period of His Disability.

There is no dispute as to the pertinent facts. Appellant had been employed on the S. S. "CATALINA" as an oiler since the 2nd day of July, 1946, until the date of his injury on November 8 of the same year. The S. S. "CATALINA" made daily trips from Wilmington to Avalon and return. Appellant was in the immediate vicinity of the dock at which the S. S. "CATALINA" was moored when he sustained his injuries.

The law applicable to the case is well settled. In *The Osceola*, 189 U. S. 159, the Court stated:

"Upon a full review, however, of English and American authorities upon these questions we think the law may be considered as settled upon the following propositions:

1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued . . ."

This case has been consistently followed down to the present date.

O'Donnell v. Great Lakes Dredge Co., 127 F. 2d 901;

Mason v. Evanisevich, 131 F. 2d 858;

Pacific Mail S. S. Co. v. Lucas, 264 Fed. 938;

Longstreet v. Steamboat S. S. "Springer," 4 Fed. 671;

Jones v. Waterman S. S. Corp., 155 F. 2d 992, 996.

See, also:

Farrell v. U. S. A., 336 U. S. 511.

Particularly applicable to the present case is the decision in *Enochsson v. Freeport Sulphur Co.*, 7 F. 2d 674. In that case Enochsson was a member of the crew of the "FREEPORT SULPHUR No. 1" on coastwise articles for a term not to exceed six calendar months. A number of trips were made by the "FREEPORT SULPHUR No. 1" shuttling back and forth between the same ports. The court held that the employment did not terminate at the end of one particular passage to a particular port and return but for the full period of the contract.

There can be no question that appellant was employed during the seasonal operation of the S. S. "CATALINA" to which vessel he returned as soon as he had recovered from his injury. The Court found that appellant was a steady employee and thus it was bound to award wages for the duration of the employee's contract. The failure of the Court to award wages to appellant is inconsistent with the findings as to his employment.

Conclusion.

It is respectfully submitted that appellant herein is entitled to recover his full wages from November 9, 1946, to and including the 13th day of April, 1947, and that the decree of the United States District Court herein denying the wages to appellant should be reversed.

Respectfully submitted,

DAVID A. FALL,

Proctor for Appellant.

APPENDIX.

I.

The District Court erred in finding that it is not true that by reason of the premises of its findings of fact that libelant is entitled to recover wages from respondent herein from the 9th day of November, 1946, to the 13th day of April, 1947.

II.

The District Court erred in not finding that the libelant was entitled to recover his full wages during the entire period of his disability from the 9th day of November, 1946, to and including the 13th day of April, 1947.

III.

The District Court erred in not finding that the libelant was entitled to recover from respondent his wages from the 9th day of November, 1946, to and including the 26th day of June, 1947, in the sum of \$3,799.88.

IV.

The District Court erred in not finding that the libelant was entitled to recover his wages during the period of time that he was disabled and incapacitated from work as the result of injuries sustained while in the service of the S. S. "CATALINA."

